STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2003
v	No. 228023 Kent Circuit Court
KENNETH JOSEPH MADEJCZYK, Defendant-Appellant.	LC No. 99-008387-FH

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant, the former police chief for the City of Grandville, was convicted of five counts of embezzlement by a public official, MCL 750.175, for his conduct involving public funds between 1994 and 1999. He was sentenced to concurrent terms of 4-1/2 to 10 years' imprisonment for each count. He appeals as of right. We affirm.

I

Defendant first argues that he was improperly bound over for trial. A district court's decision to bind over a defendant is reviewed by the circuit court, which may reverse only if it appears on the record that the district court abused its discretion. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). "Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion." *Id.* At the preliminary examination, the prosecutor is not required to prove each element beyond a reasonable doubt and may rely on circumstantial evidence and reasonable inferences from the evidence. *People v Brown*, 239 Mich App 735, 741; 610 NW2d 234 (2000).

On appeal, defendant challenges the sufficiency of the evidence presented at the preliminary examination with respect to whether he converted the money for his own personal use. We find that the evidence was sufficient to support the bindover.

With respect to count one, defendant admitted to removing the fireworks money from the evidence safe. He told the investigating detective, Curtis Schram, that the money was used to pay Officer Scott Pellerito's informant and that this occurred before the narcotic fund was in existence. These statements were contradicted by other evidence. The fund came into existence in 1991. The fireworks sale was in 1994. Moreover, Pellerito never received the money or heard of an informant being paid $1,000.

With respect to count two, defendant had inadequate records to support the expenditure of the funds and there was testimony that the amounts claimed to be spent on informants were unbelievable.

With respect to count three, defendant claimed that after cashing the $300 salvage check on March 16, 1999, he used the money to pay an informant. Defendant's journal did not support this claim and his explanation to the bank clerk who cashed the check was inconsistent with his assertion that he used the money to pay the informant. In addition, defendant misrepresented that the March 1999, salvage check was the only salvage check he cashed.

With respect to count four, defendant never told city officials about the petty cash fund and his explanation about how he used the money was refuted by the testimony of a police dispatcher. She testified that she was unaware of any items defendant purchased for the department with the money.

Finally, with respect to count five, defendant cashed a $3,000 check drawn on the city's accounts. Within fifteen minutes on the same day, a cash deposit of $1,500 was made into defendant's credit union account. The credit union was 2-½ miles from the bank where defendant cashed the city check. Our review of the record reveals that defendant's lack of candor and misrepresentations about how the money was spent established a reasonable ground of suspicion for each count that he misused the money by appropriating it for other than legitimate purposes.

We also note that defendant complains that the preliminary examination evidence supported that only $950 in salvage money was missing, not the $2,200 alleged in the criminal complaint. A deficiency in the evidence at the preliminary examination does not require reversal if sufficient evidence was presented at trial to convict on the charge. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

II

Defendant next argues that statements made by him on March 23 and March 24, 1999, without the benefit of *Miranda*[1] warnings should have been suppressed. The trial court's factual findings after a suppression hearing are reviewed for clear error. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). The critical issue, however, of whether defendant was in custody such that he was entitled to *Miranda* warnings is reviewed de novo. *Id.*

Defendant was not in custody on March 23, 1999 or March 24, 1999, and thus, he was not entitled to *Miranda* warnings. The trial court properly refused to suppress his statements on those grounds.

> *Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of an investigation. Custodial interrogation is " 'questioning initiated by law enforcement officers after a person

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" [*Id.* at 395-396 (citation omitted).]

In other words, "[a]n officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *People v Peerenboom,* 224 Mich App 195, 197-198; 568 NW2d 153 (1997) (citation omitted). When determining whether a defendant was in custody at the time of interrogation, the totality of the circumstances is reviewed. *People v Coomer,* 245 Mich App 206, 219; 627 NW2d 612 (2001), quoting *People v Zahn,* 234 Mich App 438, 449; 594 NW2d 120 (1999). The key question is whether the accused could reasonably have believed that he was not free to leave. *Id.* Objective circumstances are reviewed rather than the subjective views harbored by the interrogating officers or the person being interviewed. *Id.* at 219-220.

The trial court determined that defendant was not in custody on March 23, 1999. Upon review, we agree. Defendant was interviewed in a very large room, the doors were not locked, he never indicated that he did not want to discuss the situation, he was an active police chief for twenty-eight years, and he was aware of the policies and procedures attendant to administering rights to accused persons. In addition, he was told he would receive a ride home and he was not arrested for more than three months after the conversation. Moreover, it was clear that the investigation was in its very beginning stages when Schram spoke with defendant on that date. Defendant was not subject to a restraint on his freedom of movement to the degree associated with formal arrest. While his employment was affected, his freedoms were not otherwise impacted.

Similarly, we find that defendant was not in custody on March 24, 1999, when he was interviewed at home. Interrogations in a suspect's home are generally viewed as noncustodial. *Coomer, supra,* 245 Mich App 220. When defendant was questioned, his restraint on freedom of movement within the home was not restricted. Moreover, Schram agreed to continue the interview the following day but defendant decided to continue the conversation. Defendant was not prohibited from leaving to teach his college class. He chose not to do so. The totality of the circumstances supports that defendant could not reasonably have believed that he was subject to a restraint on his freedom of movement.

III

Defendant next argues that the trial court erred in finding that his statements were voluntary. "Whether a defendant's statement was knowing, intelligent and voluntary is a question of law that a court must determine under the totality of the circumstances." *People v Snider,* 239 Mich App 393, 417; 608 NW2d 502 (2000). We will affirm the trial court's decision in this regard unless we are left with a definite and firm conviction that a mistake has been made. *People v Sexton,* 461 Mich 746, 752; 609 NW2d 822 (2000).

A nonexhaustive list of factors to consider when determining whether a statement is voluntary is set out in *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988). None of those factors favor a finding that defendant's statements on either March 23 or 24 were involuntary.

Defendant was fifty-four years old. He was educated, and was the chief of police for more than twenty-eight years. His conversations with Schram took place on separate days and totaled less than three hours of conversation. Defendant was not in custody at any time before speaking with Schram.

While defendant was not apprised of his constitutional rights, he admitted that he was aware that he was not compelled to answer questions. Further, he never indicated that he was answering questions because he felt coerced. He was not injured, intoxicated, drugged, or in ill health. He was not deprived of food, sleep, or medical attention. He was not physically abused or threatened with abuse.

Moreover, we do not believe that employment pressures vitiated the voluntariness of his March 23, 1999, statements. There was testimony that defendant was calm and talkative after being placed on administrative leave. He offered to allow Schram to see his journal in order to try to clear up the questions. He was concerned about his fish being fed, and about obtaining personal items from his office. Nothing in the record suggests that defendant believed he was subject to termination if he failed to talk to Schram. The city manager testified that while he expected defendant to cooperate, he never considered the consequence of lack of cooperation, let alone termination. There was no discussion with respect to that subject. Defendant was not pressured into answering the questions on threat of losing his livelihood. See *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967).

We also disagree that the specific circumstances of the March 24 interview vitiated the voluntariness of defendant's statements on that date. After a short period of conversation, Schram indicated that he was willing to continue the questioning the following day. Defendant decided to continue the conversation. Further, while his wife was present in the home, she was not part of the questioning. Thus, the fact that she was upset did not affect the conversation.

IV

Defendant next argues that the trial court erred when it failed to conduct an evidentiary hearing on the issue of the warrantless searches. The issue is not preserved. We review unpreserved issues, constitutional and nonconstitutional, under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We find no plain error in this case.

During the February 25, 1999, motion hearings, the trial court heard extensive testimony with respect to defendant's statements. While the testimony was limited to issues involving the statements, it included testimony about how Schram came into possession of defendant's journal and a specific note card. After ruling on the motions to suppress defendant's statements, the trial court specifically asked defense counsel if he believed testimony was necessary with respect to the warrantless seizure of the journal and note card. Counsel replied that additional testimony was necessary only if the trial court had questions about defendant's claimed expectation of privacy in government documents. Counsel specifically stated, "Otherwise, I think the Court has heard testimony of how those items came into police possession." The trial court subsequently indicated that, while it believed it had heard adequate testimony on the subject, it would be happy to hear any further testimony defendant wished to present. Defendant did not present any additional testimony. Our review of the record indicates that a sufficient evidentiary hearing was offered and conducted given defendant's stipulation and position concerning the issues raised.

Within his argument, defendant also interjects the issue of whether he validly consented to give the note card and journal to Schram. The issue is not properly before this Court because it is not raised in the statement of questions presented. *People v Miller,* 238 Mich App 168, 172; 604 NW2d 781 (1999). Moreover, defendant does not give the issue anything more than cursory treatment at best. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

V

Defendant next argues that the trial court erred by upholding the March 24, 1999, search warrants for his home and office. Issues related to the March 24, 1999, search warrant for defendant's home are moot. An issue is moot where a subsequent event renders it impossible for this Court to fashion a remedy. *People v Briseno,* 211 Mich App 11, 17; 535 NW2d 559 (1995). In this case, the remedy sought for the invalid warrant was suppression of any evidence seized pursuant to it. The only item seized from defendant's home on March 24, 1999 was the note card that defendant handed over with consent, before the existing warrant was presented. Because no remedy can be fashioned, the issue is moot.

We review the March 24, 1999, affidavit, that supported the warrant for defendant's office, to ensure that there was a substantial basis for the magistrate's conclusion that there was a fair probability that contraband or evidence of a crime would be found in the office. *People v Whitfield,* 461 Mich 441, 445-446; 607 NW2d 61 (2000). In conducting our review, we read the search warrant and underlying affidavit in a commonsense and realistic manner. *Id.*

The affidavit in support of the March 24, 1999 warrant for defendant's office contained sufficient information, when read in a commonsense and realistic manner, to support that evidence of a crime would, with fair probability, be found in defendant's office. The affidavit contained specific information that defendant was involved in financial improprieties with respect to the city's salvage checks and narcotics fund. The affidavit set forth background facts about the investigation and how Schram, the affiant, became involved in the case. Schram indicated that he was in possession of some evidence, specifically defendant's journal, which appeared to be brand new and written in the same handwriting with the same pen. In addition, Schram averred that, in his experience of more than twenty years as a police officer who had dealt with, and paid, informants, he found the expenditures identified in the journal to be unrealistic. More importantly, Schram averred that defendant, himself, indicated that all of his papers were in his locked office. A person of reasonable caution could conclude that defendant was engaged in financial improprieties with respect to his employment position and that evidence of criminal conduct would be found in his locked employment office where all of his papers were located. Because the affidavit was sufficient, and the warrant properly issued, the trial court's decision to deny the suppression motion was appropriate.

We note, first, there is no requirement that an affidavit contain specific statements from someone that they know, or believe in their experience, that the evidence will be found in the specified location. See *People v Nunez,* 242 Mich App 610, 614-615; 619 NW2d 550 (2000), where this Court indicated that the magistrate was free to make such a logical inference on his own based on the information given.

Second, the affidavit did not have to establish a specific crime. An affidavit in support of a warrant does not have to prove anything. *Whitfield, supra,* 461 Mich 445.

Third, the affidavit contained significant information that was imparted to Schram by the city treasurer. The city treasurer was named as the source of the information in the affidavit. Identified citizens are presumptively reliable. *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993). It was apparent from the content of the information that the city treasurer spoke with personal knowledge when imparting information to Schram. MCL 780.653(a). Thus, the information was properly considered by the magistrate.

Fourth, while defendant complains there were false statements and material omissions in the affidavit and subsequent search warrant, in order to suppress based on the use of false statements, the defendant must prove that the affiant knowingly, intentionally, or with reckless disregard for the truth, included false statements in the affidavit; and that the statements were necessary to the probable cause determination. *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001). The same standard applies for material omissions. *Id.* In this case, we do not believe defendant has met his burden of proof in this regard. Further, defendant did not request a hearing on the matter. See *People v Reid*, 420 Mich 326, 335-336; 362 NW2d 655 (1984) (a hearing is held at the defendant's request).

Finally, defendant complains that the affidavit was deficient because it did not contain information to support Schram's statements about the condition of the journal. We disagree. It was within Schram's realm of experience as a police officer to state his observations with respect to the journal's appearance. Moreover, police officers are presumptively reliable. *Ulman, supra,* 244 Mich App 509. We further note that, while Schram stated his observations, he did not state mere conclusions, e.g., that the journal was fabricated.

VI

Defendant next argues that the trial court improperly denied his motion for a directed verdict and improperly shifted the burden of proof to defendant. We disagree.

In order to convict under MCL 750.175, the prosecution had to prove that defendant held public office, that he received money or property in his official capacity, that he appropriated the money or property for his own use or that of some other person, and that he did so knowingly and unlawfully, meaning that he knew that the money was public property and that he used it for an unauthorized purpose. See *People v Jones*, 182 Mich App 668, 672 n 1; 453 NW2d 293 (1990). In a lengthy, well-reasoned opinion, the trial court denied the directed verdict motion after ruling the evidence was sufficient. The trial court's ruling adequately and accurately described the evidence presented in detail and we adopt its recitation of the facts as our own on de novo review.

We find that the circumstantial evidence presented at trial, and reasonable inferences drawn from it, support that defendant misappropriated public funds for himself or another. The Grandville city charter made clear that the treasurer was to have control of all city money. The prosecution proved that defendant did not turn over all city money that came to him in the course of the police department's business. The prosecution also proved that huge sums of money were unaccounted for and that defendant's representations of how he spent the money were

contradicted at trial, unsupported by documentation, or placed into serious question by other testimony and evidence. The reasonable inference to be drawn is that defendant could not account for the funds and misrepresented how they were spent because he was misusing those funds. This inference is supported by evidence that defendant spent enormous sums of money on lottery tickets. The trial court did not shift the burden of proof to defendant. Rather, it relied on the evidence and inferences. Circumstantial evidence and reasonable inferences drawn from it can constitute satisfactory proof of the elements of the crime. *People v Lee,* 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

VII

Defendant next argues that the trial court abused its discretion when it failed to grant a mistrial after the prosecutor improperly tried to inject defendant's testimony from the suppression hearing into trial. We review the denial of a motion for mistrial for an abuse of discretion. *People v Wells,* 238 Mich App 383, 390; 605 NW2d 374 (1999). Absent a showing of prejudice, reversal is not warranted. *Id.* "The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *Id.*

At the suppression hearing, defendant testified that during his March conversations with Schram, he gave Schram totally erroneous descriptions of the informants. At trial, the prosecutor asked Schram whether he was present when defendant stated under oath that he gave misleading information to Schram. Defense counsel objected. Schram never answered the question and the trial court struck the question on the record. Defendant later moved for a mistrial, arguing that testimony from a suppression hearing may not be admitted at trial unless the defendant testifies at trial and contradicts the testimony. The trial court denied the motion for mistrial, finding that, because the question was stricken and no answer was received, there was no harm. The trial court did not abuse its discretion. The jury never heard an answer to the question and was specifically instructed that the lawyers' questions are not evidence. They were also instructed that testimony or evidence that is stricken may not be considered. Any prejudice caused by the improper question was cured. Defendant was not deprived of a fair trial.

VIII

Defendant next raises several issues with respect to his sentencing. None of his arguments require resentencing.

First, defendant argues that the trial court erred in applying the former judicial sentencing guidelines to four of the five counts. Because defendant did not object at sentencing to the court's use of the judicial guidelines, this argument is unpreserved and, accordingly, we review it for plain error. *Carines, supra,* 460 Mich 763. We find no plain error requiring resentencing. All five convictions were for the same crime, embezzlement by a public official. Both the judicial and legislative guidelines were scored for the crimes because they occurred during different time frames.[2] Defendant was sentenced outside of the recommended ranges for all five

[2] The legislative guidelines apply to crimes committed after January 1, 1999, MCL 769.34(2), while the former judicial guidelines apply to crimes committed before that date. *People v*
(continued…)

of his convictions. The sentence imposed for each conviction was the same, and all of the sentences were concurrent. Thus, even if the wrong guidelines were applied to one of the convictions, defendant cannot demonstrate that the error affected the outcome of his sentencing.

Defendant also raises issues concerning the scoring of two offense variables under the judicial guidelines, specifically offense variables 8 and 25. Scoring errors under the judicial guidelines cannot form the basis of appellate relief unless a factual predicate upon which the scoring is based is wholly unsupported, is materially false, and there is a finding that the sentence is disproportionate. *People v Raby*, 456 Mich 487, 496-498; 572 NW2d 644 (1998); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001).

The trial court scored OV 8, continuing pattern of criminal behavior, based on information that sums of money of $70,000 disappeared over an approximate two-year period. Contrary to defendant's argument, this factual predicate is supported by the evidence. There was testimony that $52,500 was disbursed to defendant from the narcotics enforcement fund between July 1997 and March 1999. There was testimony that, in the same period of time, defendant cashed salvage checks totaling $2,200. Moreover, between 1993 and 1999, he received approximately $17,500 in petty cash and $1,000 from the sale of the fireworks. Most of the money came into defendant's possession between July 1997 and March 1999. What happened to the money was the subject of the trial. Given the evidence, there was no error in the scoring of OV 8.

Defendant's argument regarding the scoring of OV 25, contemporaneous criminal acts, is cursory and devoid of citation to authority. We decline to review the issue. *Kelly, supra,* 231 Mich App 640-641. Similarly, we find that defendant's challenge to the scoring of OV 10, exploitation, under the new legislative sentencing guidelines is abandoned. Defendant simply announces his position that the city could not have been "exploited" and that ten points were therefore improperly scored under the variable. He fails to rationalize, explain, or support his position, and does not recognize that the test is whether the offender abused his or her authority status to accomplish the crime. In any event, we decline to review it. *Id.*

Defendant was, as previously noted, sentenced outside of the recommended guidelines ranges under both the judicial and legislative guidelines. For the counts covered by the judicial guidelines the trial court was not obligated to sentence defendant within the guidelines, but was required to articulate the basis for its departure outside those guidelines. *Hegwood, supra,* 465 Mich 438-440. The key is whether the sentence is proportionate to the seriousness of the crime and the defendant's prior record. *People v Rockey,* 237 Mich App 74, 79; 601 NW2d 887 (1999).

In this case, the trial court articulated that it was deviating from the guidelines because they did not sufficiently take into account the violation of defendant's position of public trust. We agree.

(…continued)

Reynolds, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Defendant's conduct was egregious and was in complete contravention of his sworn duty to uphold the law, as police chief, for the people of Grandville. Nothing in the guidelines adequately covered the situation where defendant used his position as chief of police to justify his failure to account for the funds, used his position to evade investigation, and used his position to facilitate the crime by intimidating bank tellers into cashing his checks because he was the chief of police. The trial court articulated its concern that defendant did not have even the "slightest remorse" for his conduct. Defendant continued, in the face of an avalanche of evidence, to insist that he was innocent. Lack of remorse is a valid consideration at sentencing. *People v Edgett*, 220 Mich App 686, 695 n 8; 560 NW2d 360 (1996). The sentences for the convictions covered by the judicial guidelines are proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

With respect to the trial court's departure from the legislative guidelines on one of the counts, the trial court needed to have a substantial and compelling reason for that departure and needed to state that reason on the record. MCL 769.34(3); *Hegwood, supra*, 465 Mich 439. In this case, the trial court complied with the statute. It articulated substantial and compelling reasons that were proper considerations and were not otherwise covered by the guidelines, including defendant's lack of remorse.

We also note that the trial court did not use the fact of defendant's occupation to depart from the recommended range. Rather, it looked at the misuse of defendant's occupation as chief of police when departing from the guidelines. Defendant's abuse of power in pursuit of the crime was not adequately covered by the guidelines. Defendant is not entitled to resentencing.

Affirmed.

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Pat M. Donofrio